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No. 95-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

v.

JOHNNY DUPREE, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Does *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed. 2d 691 (1991) require a § 5 jurisdiction to "identify" "unambiguously" a law being repealed, when the Code of Federal Regulations in effect at the time of the submission allowed entire acts to be submitted without specific identification of the repealed statutes being changed?

2. Whether, if the United States Attorney General can partially grant preclearance to portions of a statute submitted in its entirety, the burden then shifts to the United States Attorney General to identify unambiguously those portions of a voting change to which she objects, following *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) as to requirements regarding burden of proof shifts in a remedial statute?

3. Whether a municipal school board possesses standing under § 5 of the Voting Rights Act to enjoin a state statute in the situation where the vote dilution requisite, the only "change affecting voting" for § 5 jurisdiction, is created by the municipal school district's attempt to utilize the Voting Rights Act in this action to expand its boundaries into a predominantly white area, thereby diluting existing black voting strength within the school district?

4. Did the three-judge district court err in construing its duties under § 5 of the Voting Rights Act when it refused to accept evidence and address a remedy that would affect voting?

QUESTIONS PRESENTED FOR REVIEW – Continued

5. Whether, or to what extent, must a federal three-judge court (1) give deference to a prior state supreme court ruling in an identical case construing § 5 of the Voting Rights Act, particularly in light of the ruling in *Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) on § 2 of the Voting Rights Act, and (2) be bound by the state supreme court's construction of a previously precleared statute as a matter of state law?

6. Given (1) that the appointment (as opposed to the election) of school board members has been held outside the realm of Fourteenth Amendment scrutiny for purposes of a one person, one vote inquiry, (2) that a city has been held warranted under the Fourteenth Amendment in extending boundaries for certain purposes without assuming responsibility for all public functions, and (3) that *Milliken v. Bradley*, 418 U.S. 717 (1974), generally has prevented equal protection challenges from being raised across district lines, can the United States Justice Department claim § 5 statutory coverage under the Voting Rights Act for a change affecting solely district boundaries for appointed school board members, particularly after *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).

7. Are the challenged provisions of Mississippi's Uniform School Law of 1986 subject to preclearance procedures of § 5 of the Voting Rights Act when the law affects district boundaries of appointed school board members only, and does not affect any "qualification or prerequisite" or any "standard, practice or procedure with respect to voting", contrary to *Presley v. Etowah*

QUESTIONS PRESENTED FOR REVIEW – Continued

County Com'n, 502 U.S. 377, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)?

8. Whether the All Writs Act grants a three-judge court jurisdiction to enjoin the operation of precleared § 52 of the Mississippi Uniform School Law?

9. Whether the remedy for failure of preclearance is one that affects voting as opposed to ceding geographic territory, students, tax bases and tax revenues to adjoining urban school districts?

PARTIES TO PROCEEDINGS BELOW

The parties in the Court below were:

Plaintiffs: Johnny Dupree, Jeff R. Bowman, Catherine Jones and Charlotte Tullos, individually and in their official capacities as then members of the Board of Trustees of the Hattiesburg Public School District. Current Hattiesburg Board of Trustee members are Dr. Joe Paul, Roger McDowell, Daisy Thorne, Sam Buchanan and Warren G. Hood. None is a member of a minority group.

Defendants: Mike Moore, in his capacity as Attorney General of the State of Mississippi, and the State of Mississippi are Defendants in this action. Ray Mabus, in his capacity as Governor of the State of Mississippi was dismissed from this action, accordingly his successor is not substituted as a party defendant.

Defendants/Intervenors: (1) The Lamar County Board of Education and Trustees, in their official capacities. At the time the action was filed, the members of the Lamar County Board were Charles L. Cameron, Rita Downs, Tommy Graham, Freddie G. Howell and Dr. Johnny R. Purvis. James Siders has replaced Stephen High who replaced Rita Downs on the Board. Fred Boudreaux has replaced Dr. Johnny R. Purvis on the Board. Robert P. Sandifer has replaced Charles L. Cameron on the Board. (2) Forrest County School District and Members of its Board of Trustees, in their official capacities. At the time the action was filed, the members of the Forrest County School Board were Bobby Patrick, Frank Myers, Mike Gilpin, John E. Clark and W. Larry Thompson.

PARTIES TO PROCEEDINGS BELOW – Continued

Current members of the Forrest County School Board are Mike Gilpin, Frank Myers, John E. Clark, John Pilot Lee and Terry Ryals.

Amicus Curiae: The United States of America has participated as amicus curiae to this proceeding since March 25, 1991.

The Plaintiffs in the Court below are the Appellees in this Court. The Appellants in this Court are the Defendants and the Defendants/Intervenors with the exception of Ray Mabus, former Governor of Mississippi, who was dismissed by the three-judge district court and is not a party to this appeal.

This Jurisdictional Statement is filed on behalf of The Lamar County Board of Education and Trustees in their official capacities. The Forrest County School District and Members of its Board of Trustees, in their official capacities, and Mike Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi, are filing a separate jurisdictional statement and appendix, in which the Lamar County Board of Education also joins.

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INTRODUCTION

After the Supreme Court directed to the Solicitor General the question: (1) "In light of Mississippi Supreme Court's holding in *Greenville Public School District v. Western Line Consolidated School District*, 575 So. 2d 956 (Miss. 1991), that Miss. Code Ann. Sec. 37-7-103 (1972 & Supp. 1990) supersedes Miss. Code Ann. Sec. 37-7-611 (1972) and repeals it by implication, what remedy, if any, can a federal court offer for failure to preclear Section 47 of the Education Reform Act, 1986 Miss. Gen. Laws ch. 492, which also reported to repeal Sec. 37-7-611?" and directed to the three judge court below the question: (2) "Whether it [the three-judge district court] has enjoined only Section 47 of the Uniform School law, 1986 Miss. Gen. Laws Ch. 492, or whether it has also enjoined the effect of Section 52 of the Act (codified as Miss. Code Ann. § 37-7-103 (1972 and Supp. 1990)), insofar as Section 52 implicitly repealed Miss. Code Ann. § 37-7-611 (1972)?", the three-judge court enjoined Section 52, as well as § 47, of the Mississippi Uniform School Law of 1986.

OPINION BELOW

Dupree v. Mabus, 776 F. Supp. 290 (S.D.Miss. 1991), *(Dupree I), vacated and remanded, Dupree v. Moore*, 503 U.S. 930, 112 S.Ct. 1462, 117 L.Ed.2d 609, 60 U.S.L.W. 3651 (1992), *on remand, Dupree v. Moore*, 831 F. Supp. 1310 (S.D.Miss. 1993), *appeal dismissed, Moore v. Dupree*, 114 S.Ct. 872, 127 L.Ed.2d 69, 62 U.S.L.W. 3470 (U.S. 1994), *later proceeding, Moore v. Dupree*, 115 S.Ct. 1684, 130 L.Ed.2d 550, 63 U.S.L.W. 3311 (1994), *vacated and remanded, Moore v.*

Dupree, 11 S.Ct. 1684, 131 L.Ed.2d 550, 63 U.S.L.W. 3753 (1995).

JURISDICTION

The District Court's Order denying the Appellants' Joint Motion for New Trial or to Alter and Amend Judgment was entered on February 8, 1996 (Appendix B). An Amended Notice of Appeal was filed on February 20, 1996 (Appendix Q). The District Court's Final Judgment from which Appellants sought relief in said motion was entered on January 9, 1996 (Appendix K). The original Notice of Appeal with regard to said Final Judgment was filed on February 8, 1996 (Appendix R). The Court has jurisdiction of this appeal pursuant to 42 U.S.C. § 1973c, 28 U.S.C. § 1253, 28 U.S.C. § 2101 and 28 U.S.C. § 2106.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1973c

This statute is reprinted in App. N, at 88a.

28 C.F.R. § 51.25 (1986)

This regulation is reprinted in App. O, at 90a.

28 C.F.R § 51.35 (1986)

This regulation is reprinted in App. P, at 92a.

Miss. Code Ann. § 37-7-611 (1972)

This statute is reprinted in App. L, at 84a.

Miss. Code Ann. § 37-7-103 (1972 and Supp. 1990)

This statute is reprinted in App. M, at 87a.

STATEMENT OF THE CASE

This case arises from the enactment by the State of Mississippi of a comprehensive revision to its education laws, embodied in the Education Reform Act called the Uniform School Law of 1986. (App. X, p. 128a). One section, § 47 of the Uniform School Law, repealed a former provision, § 37-7-611 (App. L, p. 84a), which governed the modification of school district boundaries when territory is annexed by a city. Section 37-7-611 had held that an urban school district's geographic boundaries were coterminous with city limits. Annexations by cities therefore automatically expanded school boundaries. Another section, § 52 of the Uniform School Law, amended Miss. Code Ann. § 37-7-103 (1972) (App. M, p. 87a) to give the board of each school district the authority to control the geographic boundaries of the school district. Section 52 provides that a school district may move its geographic boundaries into a neighboring district only with the consent of the neighboring district. It is uncontested that § 52 of the Uniform School Law was precleared under § 5 of the Voting Rights Act. Both these sections have now been enjoined by the three-judge district court convened pursuant to § 5.

Prior law under § 37-7-611 had provided that when a city annexed territory, the municipal school district automatically expanded to become coextensive with the newly created city limits. The repeal of § 37-7-611 under

the Uniform School Law would end the automatic expansion of school district territories to municipal boundaries upon annexation. The method of expanding a school district into neighboring territory would then reasonably be governed by § 52 of the Uniform School Law, which required the consent of the neighboring school board before the expansion of a school district corresponding to a city's expansion would take place.

28 C.F.R. § 51.27(b) (1987) now provides that a copy of any repealed statute should be included with a § 5 submission of the repealing legislation. That specific regulation was not in effect at the time of Mississippi's submission of the Uniform School Law of 1986.

On July 22, 1986, the State of Mississippi identified the Uniform School Law to the United States Department of Justice for preclearance under § 5 by submitting that "Mississippi Uniform School Law of 1986 . . . is submitted . . . in its entirety," and, again, that "the complete act is submitted for review." (App. X, p. 131a).

On August 29, 1986, the Justice Department represented that it did "not interpose any objection to the voting changes occasioned by Senate Bill No. 2117 (1986) [the Uniform School Law] as identified in your July 22, 1986, letter." (App. Z, p. 203a).

On March 31, 1989, the Justice Department interposed an objection to § 47, the repealer of § 37-7-611. (App. DD, p. 230a) (specifically noting that, "we recognize that demographic patterns are not uniform throughout the state . . . ", p. 231a). After the State asked for

reconsideration, (App. EE, p. 234a) the Justice Department again determined it would not withdraw the objection by its letter of May 25, 1990 (App. FF, p. 264a) arguing that the Justice Department should not have the responsibility of uncovering prospective voting changes "of which the state itself seemingly was unaware at the time the prior submissions were made." (App. FF, p. 266a).

This civil action commenced on February 23, 1990, when the members of the Hattiesburg School District, individually and in their official capacities, filed suit against the Governor and Attorney General of the State of Mississippi. The City of Hattiesburg, within which the plaintiffs'-appellees' school district is located, had enjoyed a series of annexations into adjoining counties in 1966, 1979, 1981, 1982, 1985 and 1989. All annexations that affected voting (except one[1]) in the City of Hattiesburg had been precleared under § 5 of the Voting Rights Act.

While this case was pending, and before any ruling was issued in the instant case, the Mississippi Supreme Court determined that it had concurrent jurisdiction with the local three-judge federal district court and held that § 47, the repealer of § 37-7-611, had been precleared pursuant to § 5 of the Voting Rights Act and further held that § 52 of the Uniform School Law was "a subsequent enactment covering a field of operation co-existent with

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[1] The 1966 annexation into Lamar County was never precleared by the United States Justice Department. The 1966 annexation is the only Lamar County area sending children to school in Hattiesburg.

[Section 37-7-611]" that "cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts." These judgments by the State Supreme Court were dismissed without discussion by the three-judge federal court in *Dupree II* by the single sentence footnote 10: "Hence, this court does not find persuasive the holding in *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1991), *cert. denied*, 502 U.S. 950, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), which held that the Attorney General had in effect precleared the repeal of Section 37-7-611 when he precleared Section 52." (App. E, p. 59a).

On April 17, 1995, the Court vacated and remanded *Dupree II* with directions for the District Court to address the following issues: " . . . to clarify whether it (the three-judge district court) has enjoined only Section 47 of the Uniform School Law, 1986 Miss. Gen. Laws ch. 492, or whether it (the three-judge district court) has also enjoined the effect of Section 52 of the Act (codified as Miss. Code Ann. Section 37-7-103 (1972 & Supp. 1990)), insofar as Section 52 implicitly repealed Miss. Code Ann. Section 37-7-611 (1972)." The three-judge district court held that although § 52 had been precleared, its operation and effect would be enjoined by the All Writs Act. The Court again overruled[2] motions of the Forrest County and Lamar County School Districts requesting the Court to address whether its remedy would affect voting in school district elections and/or geographic territory by

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[2] Identical motions were overruled after *Dupree I* (App. G, p. 76a) and *Dupree II* (App. I, p. 79a).

ordering the Hattiesburg School District boundaries moved to the city's urban limits, thereby absorbing students, tax base, and tax revenues.

The Justice Department had concluded that repealing the automatic school district annexation provisions of § 37-7-611 would be "likely to create a class of city voters (for the most part predominately white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." (App. DD, p. 232a). The Justice Department also noted that the State of Mississippi had provided "no explanation for the establishment of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently from white voters." (App. DD, p. 232a).

There have been no evidentiary hearings below. The case was disposed of on summary judgment when the three-judge district court held that enforcement of the repealer of § 37-7-611 was enjoined and denied the appellant school districts' motion to fashion a remedy.

ARGUMENT

SHOULD THE THREE-JUDGE COURT BELOW HAVE GIVEN DEFERENCE TO THE MISSISSIPPI SUPREME COURT?

Growe v. Emison, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993), held that the state's instrumental role in redistricting inheres in the judicial branch as well as

the legislature. "Minnesota can have only one set of legislative districts, and the primacy of the state in designing those districts compels the federal courts to defer." *Id.*, at 122 L.Ed.2d 400.

Here, during the pendency of this case, the Mississippi Supreme Court decided in *Greenville Public School Dist., et al. v. Western Line Consol. School Dist., et al.*, 575 So.2d 956 (Miss. 1991), *cert. denied*, 502 U.S. 950, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), that § 47 had been precleared and that if § 47 had not been specifically precleared, it had been precleared by implication. The Mississippi Supreme Court then construed state law, holding that § 52 which was precleared,[3] was in conflict with § 47 and, due to rules of statutory construction, § 52 would prevail.

The Mississippi State Supreme Court applied common views of statutory construction, citing only *Sutherland on Statutory Construction*, basic hornbook law, for the proposition that the Uniform School Law's precleared provisions, coming later in time than the earlier § 37-7-611, were precleared by implication when the later enactment was both passed as part of Mississippi law and precleared by the United States Attorney General.

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[3] Section 52 was among the 13 express submissions of the State of Mississippi specifically identified in the submission of the Uniform School Law of 1986 to which the United States Attorney General specifically entered no objection. (App. Z, p. 203a, referencing App. X, at p. 133a). Since Section 52, mandating consent by all school districts before school boundaries can change, was precleared, the more specific Section 47, applying only in municipal annexations, must have been precleared.

If this Court is to overturn a state supreme court determination of federal voting rights, it should not do so in a manner which conflicts with generally accepted state common law. What is being overturned is not some racist anomaly of a single state's class or race based animus. Mississippi is not relying on a state poll tax or some other discredited vehicle of racism to oppose the federal court § 5 interpretation. What is involved here is as basic a principle as can be enunciated in the law. A later statute, § 52, controls an earlier one, § 37-7-611.

Ruling contrary to the decision in *Greenville v. Western Line* puts the federal court's jurisprudence in conflict with state law in at least three areas: (1) the force to be given statutory construction, (2) the extent to which the federal courts under § 5 may address state equity concerns upon annexation, and, (3) whether the Mississippi Supreme Court is empowered to decide § 5 issues, at least insofar as applying state law.

Last term, the United States Supreme Court identified as an open question whether or not a state court must undertake jurisdiction in the context of another civil rights statute, § 1983. Though uncertain whether a state court *must* undertake such causes of action, it is clear that the state court *may* assume jurisdiction. It will be presumed that state courts may hear and decide violations of federal law under the Supremacy Clause. If the state courts do undertake that litigation, their decisions are binding: "When they have jurisdiction, state courts have been compelled to provide federal remedies." *National*

Private Truck Council, Inc. v. Oklahoma Tax Commission, ___ U.S. ___, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995).[4]

Hathorn v. Lovorn, 457 U.S. 255 (1982) previously discussed the intersection of state and federal authority in § 5 issues.[5] Prior cases discussing *Hathorn v. Lovorn* have, to the extent the issue has been raised at all, read that case to mean that there is concurrent jurisdiction within the state courts over § 5 of the Voting Rights Act. That was the ruling of the three-judge district court as to concurrent jurisdiction in *Dupree I*, 776 F. Supp. 290, at 298. Such a reading is supported by the clear language of *Hathorn*: "Accordingly, we hold that the Mississippi courts had the power to decide whether Section 5 applied to the change sought by respondents. If the Mississippi courts had the power to make this determination, then it is clear that they also had the duty to do so. 'State courts, like federal courts, have a constitutional obligation . . . to uphold federal law'." 457 U.S. 255, 269. As the *Hathorn* dissent states, "From a practical point of view, I think the

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[4] *National Private Truck* was a state tax case. The § 5 injunction here presented will impact on the tax base and elements of fiscal survival for the Lamar County Schools.

[5] In *Hathorn v. Lovorn*, 457 U.S. 255, 269 n.23 (1982) the Court stated: "[p]ersons dissatisfied with a state court's . . . resolution of a Section 5 issue in proceedings involving other parties . . . are likely to be able to litigate the issue anew in federal court." *Hathorn* did not discuss the possibility of, for example, collusive suits being brought in a chosen forum to obtain a chosen result. An issue of collusiveness with voting rights implications was presented in *LULAC v. Clements*, 999 F.2d 831 (5th Cir. en banc 1993) *cert. denied, LULAC v. Attorney General*, ___ U.S. ___, 114 S.Ct. 878, 127 L.Ed.2d 74 (1994).

Court's decision is bound to breed conflicts between the state courts and the federal district courts sitting within the States . . . " 457 U.S. 255, 271 (Rehnquist, J. dissenting). There is an unavoidable conflict between the state law[6] precedent of *Greenville*, the federal court rulings in *Dupree II*, and the current ruling in *Dupree III* that, effectively, § 52 was not rendered enforceable by preclearance.[7]

Federalism and the "slim judicial competence to draw district lines" weigh heavily against judicial intervention in voting decisions. *Miller v. Johnson*, ___ U.S. ___, ___, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). These duties belong to the State through its legislature or other body, rather than a federal court. 115 S.Ct. 2488, *citing Growe v. Emison*, 507 U.S. 25 (1993) and *Chapman v. Meier*, 420 U.S.

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[6] If the rulings of *Greenville, Mississippi* are construed as a matter of state law, recent pronouncements from the United States Supreme Court would seem to make it clear that the state construction would control, *e.g.*, "In construing the . . . ordinance, we are bound by the construction given it by the Minnesota court" *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992).

[7] If the Voting Rights Act did fall exclusively into federal law its results would be controlled as a matter of federal law. *E.g., D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (exclusive jurisdiction). If to the contrary, the Voting Rights Act could be decided based on statutory construction from state law or annexation principles from state law then its result would be controlled as a matter of state law. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). When a federal act may be applied by the state courts as equally competent in jurisdiction and with equal power to enforce its interpretations under that act, then the potential conflict, and resulting crisis in comity and federalism, necessarily result, *E.g. Private Truck, supra.*

1, 27 (1975). "The Constitution itself allocates this responsibility to States. U.S. Const., Art. I, § 2, *Growe v. Emison*," *Id.*

This Court should consider whether the ruling of a state supreme court on a federal § 5 question is binding.

CAN A FEDERAL COURT, UNDER § 5 OF THE VOTING RIGHTS ACT, ENJOIN AN OTHERWISE PRECLEARED VALID STATE STATUTE WHICH CONFLICTS WITH BUT SUPERSEDES A STATUTE PURPORTEDLY ENJOINED BECAUSE NOT PRECLEARED?

The three-judge district court below enjoined "the effect" of § 52 of the Uniform School Law, not under § 5 of the Voting Rights Act, but under the All Writs Act. This ruling is startling, and unprecedented.

The All Writs Act could have been used to reach the opposite conclusion, that, since § 52 had been precleared, the conflicting provisions of § 47 would be declared precleared under the All Writs Act. This was the result reached by the Mississippi Supreme Court under *Greenville v. Western Line*, except that the State Supreme Court relied upon general principles of statutory construction instead of the generally unprincipled All Writs Act.

The All Writs Act, 28 U.S.C. § 1651, provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The All Writs Act "provide[s] a federal court with various common law equity devices to be used incidental to the authority conferred on the court by rule or statute," but only "with

those writs necessary to the preservation or exercise of its subject matter jurisdiction." *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978) (citation omitted). As the Supreme Court has emphasized, "although the Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. U.S. Marshals Serv.*, 474 U.S. 34, 43, 106 S.Ct. 355, 361, 88 L.Ed.2d 189 (1985).

In this case, the actions taken by the district court are not indispensable in reaching a disposition of the case. The opposite disposition reached by the Mississippi Supreme Court is justifiable under basic tenants of statutory construction without reaching for authority under the All Writs Act. It is unclear how the three-judge court, which has limited authority to act under the auspices of § 5 of the Voting Rights Act, may use the All Writs Act to protect, or extend, its jurisdiction. Accordingly, it is a substantial question whether the All Writs Act can be used to justify the challenged injunction.

The principles of *res judicata* and the spirit of the Anti-Injunction Act, 28 U.S.C. 2283, may well be violated by the three-judge court's injunction, *cf. Wesch v. Folsom*, 6 F.3d 1465 (11th Cir. 1993); *Puerto Rican Legal Defense and Education Fund v. Gantt*, 796 F. Supp. 677 (E.D.N.Y. 1992) (three-judge court); *Roe v. Mobile County Appointment Board, State of Alabama*, ___ So.2d ___, 1995 Ala. LEXIS 128 (Ala. 1995) and *see also, Members of the Calif. Democratic Cong. Delegation v. Eu*, 790 F. Supp. 925 (N.D.Cal. 1992)

(federal court abstained in favor of state final judgment redistricting the entire state), *rev'd on other grounds and remanded sub nom. Benavides v. Eu*, 34 F.3d 825 (9th Cir. 1994); *Cotlow v. Emison*, 502 U.S. 1022, 112 S.Ct. 855, 116 L.Ed.2d 761 (1992) (vacating order of three-judge court enjoining state court proceedings where state court was on eve of issuing final judgment and where case involved disputed questions of state constitutional law), *appeal dismissed*, 502 U.S. 1068, *later proceedings sub nom., Growe v. Emison*, 507 U.S. 25, 122 L.Ed.2d 388, 113 S.Ct. 1075 (1993).

This Court should accept review concerning the scope of the valid application of the All Writs Act and whether a precleared State statute can be enjoined by a federal court, pursuant to the All Writs Act or any other rule of statutory construction.

A § 5 DECISION MUST ADDRESS THE REMEDY TO BE IMPOSED.

What is the remedy if the issue of the voting change really does implicate the boundary expansions of a city school district? It will necessarily be part of a § 5 District Court's responsibility to make a realistic assessment of the material changes in the management of a school district upon the annexation of territory, all those changes which are now part of the analysis used in state courts for evaluating the equities involved in an annexation issue.

The Uniform School Law was intended to work as a whole. For example, the injunction against § 52, codified as 37-7-103, leaves in place § 37-3-105, which sets forth the process to use in instances of alteration of school district boundaries. Among the steps to be taken under

37-7-105 is a requirement for preclearance under § 5. Also required are steps for notice and referendum and approval by the State Board of Education. All of these processes, required under State law, must be superseded by the three-judge district court's injunction, but in order to do so, § 37-7-105 must be enjoined as well. Alternatively, the version of § 37-7-103 that predated the Education Reform Act may be reinstated. If so, another conundrum is created, because the former law vested decision-making authority solely in the county school district, not the municipal district. Reverting to the former law places the duty to dissolve itself or alter its boundaries on the Lamar County School Board.

The previous 37-7-103 does not provide the mechanism by which bonds, debts, obligations, taxes, payrolls, teacher retention procedures, and other administrative duties are to be transferred to the new school district. Also among the problems created is the re-definition of the Lamar County School District as a consolidated, rather than a county-wide, school district. The Uniform School Law treats these distinctions as significant as to the types of administrative procedures required, and also, significantly, as determinative of the types of electoral process to be employed. The injunction against § 52, therefore, creates at least two new changes affecting voting: (1) the required opportunity for a referendum under 37-7-105 (or lack thereof if old 37-7-103 is employed) and (2) the change in voting that results to the Lamar County School District when it becomes the Lamar County Consolidated School District.

In addition to the collision with *Greenville Public School District, et al. v. Western Line Consolidated School*

District, 575 So.2d 956 (Miss. 1991), *cert. denied*, 502 U.S. 950 (1992), now that § 52 is enjoined, another collision occurs with *CIVIC v. Wayne County Board of Education*, 574 So.2d 619 (Miss. 1990). That decision from the Mississippi Supreme Court interpreted the Uniform School Law of 1986, particularly §§ 37-7-103 and 37-7-105. It held that 37-7-103 (that is, § 52 here enjoined) must be read together with §§ 37-7-105, 37-7-107, 37-7-109, 37-7-111, 37-7-113, and 37-7-115, as well as §§ 37-6-3(2) (Supp. 1990), 37-6-3 (Supp. 1989) (types of school districts) and 37-7-203 (Supp. 1989) (selection, term and qualifications of trustees of municipal separate school districts) and 37-7-207 (Supp. 1989) (selection and term of trustees of consolidated districts).

Additional practical problems come into play. The parties do not know what time frame to employ in making these changes. Must changes be made immediately, in the middle of the school year or later? Can the taxes, bonds, and obligations be settled that quickly? How are the bond obligations, if any, to be resolved, since the injunction against § 47 overruled the repeal of the bond liability pro rata assumption under 37-7-613? Must the County Boards of Supervisors be joined as necessary parties since that entity must assume responsibility for ongoing financial obligations? Will the federal Court, instead of State law, fashion its own procedures by which Hattiesburg could reimburse the Lamar School District for debts and expenses for, *e.g.*, the education of the school children involved? There has been no factual analysis of any of the myriad issues that come into being as a result of the District Court's latest pronouncement.

MISSISSIPPI'S SUBMISSION WAS PROPER

When the State submitted the § 47 repealer of § 37-7-611 in the Uniform School Law to the United States Attorney General in 1986, there was no requirement in effect that the State provide and/or identify pre-existing statutes as a part of its submission. The regulations of the Justice Department then in effect did not make it incumbent upon the State to identify specifically the pre-existing law when it described the new provisions of state law which were to go into effect if precleared.[8] As the District Court found, "While the text of Section 47 appeared in the notebook [submitted by the State], the texts of the 23 provisions repealed by Section 47 were not included", (App. E, p. 59a) and, "[h]ence, the State's submission failed to mention that pre-existing Mississippi law provided for automatic expansion of municipal school districts without requiring the consent of the school board governing the affected, annexed territory." (App. E, p. 58a).

The dissent in the three-judge district court in *Dupree II* (App. E, pp. 61a-72a) points out that this ruling exceeds the holding of *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991). The set of circumstances here presented raises questions of due process requirements for notice to submitting authorities of regulations imposed by the Department of Justice. A question is

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[8] The pertinent regulations are now changed, the old – 28 C.F.R. 51.25(b) are supplanted by the new 28 C.F.R. 51.27(b) (1987) providing that a copy of any repealed statute should be included with the Section 5 submission of the repealing legislation.

presented as to whether the Justice Department should be estopped from applying regulations other than those in effect when the submission was first made.[9] Additionally, this ruling below raises questions of retroactive application of civil rights rules. *Compare, Landgraf v. USI Film Products, Inc.*, ___ U.S. ___, 114 S.Ct. 1483 (1994) with *Powell v. Nevada*, 114 S.Ct. 1280, 1994 U.S. LEXIS 2655, 128 L.Ed.2d 1, 62 U.S.L.W. 4203 (1994). It would be appropriate to remand this case for consideration of the retroactive application of Justice Department regulations.

The impact of the three-judge court's ruling would be to require the submitting authority not only to anticipate regulatory changes, but also to anticipate the impact of a new state statute on future voting, including voting at county and municipal locations subject to independent § 5 review. There is nothing in *Clark v. Roemer, supra*, which requires or addresses this result. There is a question as to what is the proper geographic focus for a voting rights claim, that is, whether a statewide overview or a geographically compact denomination of minority interests is correct. This issue was raised but not resolved in *Johnson v. De Grandy*, 794 F. Supp. 1076; 815 F. Supp. 1550 (N.D.Fla. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 2410, 124 L.Ed.2d 634 (1993), *aff'd in part and rev'd in part*

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[9] The Justice Department states its view in opposition to retroactivity at 28 C.F.R. 51.54(b)(2): "The Attorney General will make the comparison based on the conditions existing at the time of the submission."

on other grounds, ___ U.S. ___, 114 S.Ct. 2647, 127 L.Ed.2d 2775 (1994).

The United States Supreme Court should determine in this case the appropriate range for a § 5 submitting authority.

THE BURDEN OF PROOF MUST SHIFT TO THE UNITED STATES ATTORNEY GENERAL

This Court decided *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), to establish the point at which the burden of proof would shift in civil rights employment suits brought under Title VII. The Court and the parties needed to know who would bear the burden of going forward or the burden of persuasion.

In 1986 and thereafter, uncertainty developed in § 5 of the Voting Rights Act as to whether the State continued to bear the burden of proof after it had submitted its proposed new legislation for preclearance. The law required the Attorney General to request additional information, or object, if not satisfied with the submission. Much of the confusion in this case has developed because the Justice Department did not request further information, and did not clearly object. Instead, the United States Attorney General sent what appeared to be its boilerplate preclearance letter. Nowhere did that letter unambiguously identify the voting changes to which the Justice Department had objection, neither did it request further information. To use *St. Mary's* as a parallel, the Justice Department not only did not identify a reason for its objection, it did not identify the objection itself. The

State, having identified its new Uniform School Law, had received what appeared to be a preclearance letter rather than an objection or request for more information from Justice. It was this lack of clear statement from the United States Attorney General which led to the three-judge district court's decision in *Dupree I*, 776 F. Supp. 290 (S.D. Miss. 1991) that, because the United States Attorney General had not objected, § 47 was precleared.

Although the three-judge district court did not abide by that result in its more recent decisions, the confusion which has been produced throughout this case, is more the product of the ambiguity of the Justice Department's transmittal than the fault of any concealment of information on the part of the State. The Justice Department should be clear and understandable in its response to § 5 submissions. It would be helpful to all parties, in this and other cases, to have clearly delineated the burdens of proof, so that such confusion can be avoided in the future.

THE DISTRICT COURT ERRED IN CONSTRUING ITS DUTIES UNDER § 5 OF THE VOTING RIGHTS ACT WHEN IT REFUSED TO ACCEPT EVIDENCE AND ADDRESS A REMEDY THAT WOULD AFFECT VOTING.

The three-judge district court rejected the opportunity to accept evidence and ruled on this case by summary judgment, as a matter of law. (Order, App. B, p. 9a). It did make critical fact findings however, such as its finding that a prediction of white controlled city and school district elections was correct. The Court refused to accept proof as to how to fashion an appropriate remedy.

This ruling below leaves the parties in doubt as to how to hold elections.

Brooks v. Georgia Board of Elections, held that a three-judge court has limited discretion to fashion an appropriate remedy in a § 5 action, 790 F. Supp. 1156 (S.D.Ga. 1990). The *Brooks* decision highlights a split of authority in the courts below regarding the scope of the remedial powers of a three-judge district court in a § 5 voting rights case. For example, *Dotson v. City of Indianola*, 521 F. Supp. 934 (N.D. Miss. 1981), *aff'd*, 455 U.S. 936, 102 S.Ct. 1424, 71 L.Ed.2d 646 (1982), held that the appropriate remedy must be tailored to affect voting and not geographic territory, by refusing to de-annex unprecleared annexed territory but enjoining the annexed citizens from voting in city elections.

Does the court below possess jurisdiction under § 5 to carve up the Lamar County School District, as the Hattiesburg School District plaintiffs demand? It would be appropriate to remand this case for further consideration for the fashioning of an appropriate remedy.

THE PLAINTIFF MEMBERS OF THE HATTIESBURG MUNICIPAL SCHOOL DISTRICT LACK STANDING; THEY PRESENT NO COGNIZABLE INJURY UNDER § 5 OF THE VOTING RIGHTS ACT

To find § 5 jurisdiction, the Court below had to find changes in voting practices and procedures. In *Dupree I*, the District Court held that § 47 of the Uniform School Law resulted in a class of city voters who did not reside in the city school system, but who did participate in city

elections, which led to the appointment of the school district members, thereby indirectly affecting the vote.[10]

However, enjoining § 47, on the city school board's own argument, brings about an automatic extension of the school district boundaries to be coterminous with the city limits. The result is that the same class of voters, presumably white, who will now reside in both the city and the school district, still vote in the city elections, still elect those who appoint the school board, and so still dilute minority voting strength.

This Court recently stated that the dimension of a governing authority "is a 'standard, practice, or procedure with respect to voting' " because it "increases or diminishes the number of officials for whom the electorate may vote," *Holder v. Hall*, ___ U.S. ___, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994), p. 2588 (O'Connor, J., concurring) because "this change bears 'on the substance of voting power' and has 'a direct relation to voting and the election process.' " (internal cites omitted), *Id.*, p. 2620 (Blackmun, J., dissenting). As this Court has defined standing in the voting rights context: "unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Ibid.* (O'Connor, J., concurring).

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[10] See discussion of changes affecting voting in *Dupree II*. (App. E, p. 41a). Notice that the sections quoted in *Dupree II* make reference to "voting" in every clause; (App. E, p. 45a); there is no mention of indirect impact upon appointive officers, a point discussed more fully *infra*.

The Plaintiff Hattiesburg School Board should not have standing to seek the very dilution of minority voting strength which gives rise to § 5 jurisdiction in this matter.

THE DISTRICT COURT HAS CREATED AN IMPENDING COLLISION BETWEEN THE VOTING RIGHTS ACT AND THE FOURTEENTH AMENDMENT

In *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), the United States Supreme Court determined that white citizens have standing under the Fourteenth Amendment to challenge a voting rights remedy, and similarly, considered and remanded *Louisiana v. Hays*, 839 F. Supp. 1188 (three-judge court, W.D.La. 1993), *judgment vacated and case remanded sub nom. U.S. v. Hays*, ___ U.S. ___, 115 S.Ct. 2431, 1132 L.Ed.2d 635 (1995).

In the past, issues raised by the case here at bar have not found themselves subject to relief under the Fourteenth Amendment, but rather have been at the dividing line at which the courts would not recognize Fourteenth Amendment relief. There are three areas which serve as examples. First, the appointment, as opposed to the election, of school board members has been held outside the realm of Fourteenth Amendment scrutiny for purposes of a *Reynolds v. Sims*[11] "one person, one vote" inquiry. *Sailors v. Board of Education of Kent County*, 387 U.S. 105 (1967). In *Sailors*, "one person, one vote" relief was denied where a county board of education was basically appointive rather than elected, and there was some discussion that

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[11] 377 U.S. 533 (1964)

the board was fundamentally more administrative than legislative.[12] Second, a city has been held warranted under the Fourteenth Amendment in extending its boundaries for certain purposes[13] without assuming responsibility for all public functions. *Holt Civic Center v. Tuscaloosa*, 429 U.S. 60 (1978). Similarly, it may be noted that in *Town of Lockport v. Citizens for Community Action*, the United States Supreme Court stated that "A proposal that several school districts join to form a consolidated unit could surely be subject to voter approval in each constituent school district," 430 U.S. 259, 271 (1977). Under these Fourteenth Amendment cases, it appears that the boundary disputes here at issue would be beyond the reach of the Equal Protection Clause. Third, *Milliken v. Bradley*, 418 U.S. 717 (1974) has generally prevented equal-protection challenges being raised across school district lines.

Given these developments in the case law, an issue exists as to whether the United States Justice Department can claim § 5 statutory coverage under the Voting Rights

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[12] For a recent discussion touching on executive versus legislative function as a determining element for voting rights act coverage, *see Holder v. Hall, supra*, 114 S.Ct. at 2623 (Blackmun, dissenting, joined by Justice Stevens, Justice Souter, and Justice Ginsburg).

[13] The certain purposes recognized were that the city could extend its (1) police, (2) sanitary, and (3) business licensing powers to individuals living within 3 miles of the city's corporate boundaries, meeting a rational basis test under the Fourteenth Amendment.

Act for a change affecting district boundaries for appointed school board members. Allowing the Justice Department a broader sweep through its § 5 powers will put it on a collision course with private claims brought under the Fourteenth Amendment.

THE RULING BELOW WAS CONTRARY TO *PRESLEY V. ETOWAH COUNTY COMMISSIONERS*

Is a certain portion of Mississippi's Uniform School Law, the repealer of § 37-7-611, § 47 of the Uniform School Law, subject to preclearance procedures of § 5 of the Voting Rights Act when it affects district boundaries of an appointed school board and does not affect any "qualification or prerequisite" or any "standard, practice or procedure with respect to voting", contrary to *Presley v. Etowah County Commissioners*, 502 U.S. 491, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)? The Court in *Dupree I* found § 5 applicable on the basis of an "indirect" effect on voting. The District Court below recognizes that the school district is not itself an elective body in Hattiesburg, Mississippi. The Board is appointed by the elected Hattiesburg Board of Aldermen. In *Presley v. Etowah County Commissioners, supra*, the United States Supreme Court held that changes in the appointive powers of elected officials are not subject to the Voting Rights Act.

There is, additionally, a conflict among the circuits in determining when particular political expression or organization constitutes "voting." Previously, for example, the Tenth Circuit had held that espousing or appointing a particular political viewpoint through the signing of an

initiative was not "voting" within the meaning of the Voting Rights Act of 1965. *Montero v. Mayer*, 861 F.2d 603 (10th Cir. 1988), *cert. denied*, 492 U.S. 921 (1989). The ruling from the three-judge district court cannot be reconciled with these prior decisions.

CONCLUSION

This case raises many problems because it attempts to apply the Voting Rights Act at cross purposes with the congressional intent behind that civil rights legislation. The Plaintiffs/Appellees, Hattiesburg School District, are not the disenfranchised, under-represented and poor, as the civil rights acts presume. These Plaintiffs/Appellees are the appointed members currently serving under an elected and serving city government. The Plaintiff city school district is not seeking to maximize minority voting strength, but to dilute it.

Just as the attorneys' fees provisions of the civil rights statutes are not designed to provide fees to defendants acting under color of state law, neither are the substantive provisions of the civil rights statutes intended to secure political advantage for municipal governments in ongoing turf battles. There is a risk that the three-judge district court's opinion below, left uncorrected, would lead to the future use of the Voting Rights Act as a common weapon in the arsenal of local politicians, rather than bringing about the equalization of

political representation, as was the intent of the Voting Rights Act.

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